I have already said, there was no reference to the cheques in the deed because the deed superseded them. The consideration for the deed was not stated in it, but it was for that very reason that the plaintiffs had their statement of claim amended so as to aver the consideration. Evidence as to the circumstances under which the deed came to be executed was rightly allowed to go in. Once that evidence was in and it was unrebutted, consideration was proved up to the hilt. The deed was in respect of the past debts of the defendant. How then can it possibly be said that the deed was not for any past consideration? As regards forbearance to sue, there was ample evidence from which it could be implied, and there were clear indications in the evidence of an express request not to sue. With great respect to the learned judge, the deed was not without consideration as understood in our law which he himself had correctly stated earlier in his judgment. I agree that the fact that the deed is under seal makes no difference whatsoever. That obviously was the reason why the plaintiffs made no point about it. I regret to say that I find myself unable to agree with the learned judge when he says that all that the defendant can be said to have undertaken was a moral obligation and no more.

The plaintiffs' claim may not have been simple, straightforward and indisputable on their original statement of claim, but on the facts pleaded in their final statement of claim, especially in relation to consideration for the deed, and more than substantiated by the unrebutted evidence for the plaintiffs, the claim certainly became so, so that the plaintiffs were clearly entitled to judgment.

In the circumstances, I agree with the learned Chief Justice that this appeal be allowed and that there be judgment for the plaintiffs in the amount claimed with interest as prayed and costs.

Ali F.J. concurred.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; Ramachandran & Co.*

WENG LOK MINING CO. LTD. v. HIAP LEE (CHEONG LEONG & SONS) BRICKMAKERS LTD.

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.) May 25, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 34 of 1971]

Practice and Procedure — Appeal to Yang di-Pertuan Agong — Application for leave to — Value of subject matter less than statutory minimum for appeal — Consideration of whether subject matter fit one for appeal, notwithstanding — Courts of Judicature Act, 1964, s. 74(1)(a)(iii).

This was an application for leave to appeal to His Majesty, the Yang di-Pertuan Agong.

The appellants were miners working adjacent to the property of the respondents, who were brickmakers. In March 1965, the respondents complained to the appellants that water was seeping into their property. This allegation was denied. In March or April 1965, the appellants, however, found it necessary to build a safety bund. An existing bund had to be raised higher, and another constructed, which intruded some 40 feet across the boundary into the respondents' property. This encroachment was constituted by a body of water straddling the common boundary. Sometime in April 1965, the water spilled over and flooded the respondents' property, causing damage for which they claimed compensation.

The learned trial judge found for the respondents on the issue of liability and held that the respondents were entitled to succeed under the rule in *Rylands* v. *Fletcher*(1) as well as in negligence and nuisance, and awarded general damages of $3,000 and costs.

The Federal Court allowed the appellant's appeal ([1972] 1 M.L.J. 156). The respondent applied for leave to appeal to the Yang di-Pertuan Agong.

Held, allowing the application: this case was a fit one for appeal because it was of vital importance in the public interest that any appellate court, especially the court of last resort in this country, should as a matter of course state adequately its reasons for reversing the decision of a subordinate court. Therefore, the respondents were entitled to a further appeal in order that justice may not only be done but seen to be done.

Cases referred to:-

(1) *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.

(2) *Collector of Land Revenue* v. *Alagappa Chettiar* [1971] 1 M.L.J. 43, 44.

FEDERAL COURT.

M. Shankar for the applicants/respondents.

S. D. K. Peddie for the respondents/appellants.

Ong C.J. (Malaya) (delivering judgment of the court): The appellants were miners working lands adjacent to the property of the respondents, who were brickmakers. Hydraulic mining, as in this case, requires a constant supply of water in circulation, which is conserved in pools or reservoirs; from there the water is drawn for the monitors and gravel pumps, after which it is returned *via* the dumping areas into the reservoirs to be used again. Where there are no natural pools, water has to be artificially retained in reservoirs and prevented, if necessary, by bunds from escaping. In any case, whenever a rise in the water-level — by reason of heavy rains or otherwise — is likely to cause the overflow spilling on to low-lying lands in the vicinity, such escape of water from the reservoirs has to be prevented by bunds.

In March 1965 the respondents complained to the appellants that water was seeping into their property. Though this allegation was denied by the appellants, it was nevertheless a fact that they found it necessary in March or April 1965 to build what their manager described as a safety bund. An existing bund on the right had to be raised higher and another constructed on the left, which intruded some 40 feet across the boundary into the respondents' property. This encroachment was constituted by a body of water straddling the common boundary. It was described by the Inspector of Mines, D.W.5, as 20 to 25 feet deep and 6 to 7 acres in extent, of which approximately 0.61 acre was situate on the respondents' property. The miners discovered this encroachment in late 1964, that is to say, some six months before the escape of water complained of. Sometime in April 1965 the water spilled over and flooded the respondents' property, causing damage for which they claimed compensation in the High Court.

On the issue of liability the trial judge found for the respondents. He held that, on the evidence, they

were entitled to succeed, not only under the rule in *Rylands* v. *Fletcher*[1] but also in negligence and in nuisance. It was only in respect of the five heads of *special* damage that he felt dissatisfaction over the poor quality of the evidence tendered as proof — one item he disallowed with some reluctance. As to general damages, he took all the circumstances into consideration and awarded them $3,000 and the costs of the action.

The appellants' appeal was essentially against the trial judge's findings of fact as set out in a judgment of 18 pages. The Federal Court, in a very terse judgment, allowed the appeal with costs.

The costs of the trial and the appeal have been taxed at $15,000 in round figures. Even with the award of damages added thereto, the total sum involved in this litigation is only $18,000 Under section 74 of the Courts of Judicature Act 1964, no further appeal lies as of right to the Yang di-Pertuan Agong, unless the matter in dispute in the appeal is of the value of $25,000 or upwards. Leave, however, may be granted, notwithstanding that the value of the subject-matter in dispute is of lesser value, provided that from its nature the case is a fit one for appeal: see section 74(1)(a)(iii).

The respondents' application for leave came up before this court, one of whom was the judge whose judgment was that of the court appealed against. Naturally he expressed no opinion. But the majority gave leave for the reasons following.

In the first place, we were of opinion that this case is a fit one for appeal because it is of vital importance in the public interest that any appellate court — especially the court of last resort in this country — should as a matter of course state adequately its reasons for reversing the decision of a subordinate court. With the utmost respect the judgment herein appealed against was little more than an *ipse dixit*, as may be gathered from the following excerpt therefrom: —

"In all the cases just referred to, the facts leading to the findings of liability or non-liability were beyond dispute. Here high-sounding words were used in the respondents' statement of claim to make it appear that the facts were substantially the same. But the poor quality of the respondents' evidence at the trial failed to measure up to these words. I would sum it all up by saying that the respondents' evidence failed to establish any of the liabilities alleged against the appellants."

It is true, as the trial judge himself put it, that the special damage claims "were characterised by the poor quality of evidence tendered and the general lack of proof". But this criticism does not extend to the *other* evidence, which satisfied the trial judge that the appellants should be held liable on all counts — the rule in *Rylands* v. *Fletcher*, in negligence and in nuisance.

The judge found as a fact that the water had escaped from the appellants' land on to the respondents' property. The record shows that, not only was the resultant flooding testified to by the managing director of the respondents, by another director who was the works manager and others, but it was in no way contradicted by the evidence of the appellants' own witnesses. The judge stated in full the reasons for his finding of the primary fact, which was the escape of water; then the grounds on which he held the appellants liable under such cause of action. The judgment of the Federal Court in no way showed how this finding and conclusions of the learned trial judge were against the weight of evidence. In that same judgment the point was stressed that —

"there was no evidence of the height of the water level at the pool at the material date or dates.... In my view it is important to know the height of the water level in the mining pool on or before the date of the flood. Without such evidence, the possibility or probability of the flood being caused by water flowing from other places or directions cannot be disregarded."

Again, with respect, it would seem that speculation by the appellate tribunal has been allowed to displace clear findings of fact based on evidence which had fully satisfied the trial judge. Not only had he seen and heard the witnesses, but it is important to note that, in coming to the conclusion he did regarding the escape of water and the source of the flood, the trial judge had also had the further advantage of viewing the mining land and brick-works. Having seen the lie of the land for himself, we do not think that the conclusion he formed should have been disregarded by another court which had not had the same advantage. Indeed, the Federal Court was imposing an impossible condition upon the respondents requiring them (if they were to succeed in their claim) to have kept watch on mining operations which were no concern of theirs.

In the second place, respect for precedents under the rule of law requires that authority binding on our courts must guide decisions of the Federal Court unless it can be distinguished. We have but recently been reminded by Lord Diplock that —

"Where the inferences and conclusions of the High Court are based upon findings of primary fact which are dependent upon the credibility of the oral evidence of witnesses whom the trial judge alone has had the advantage of hearing and seeing, an appellate court ought to accept the High Court's findings of primary fact save in very exceptional circumstances":

See *Collector of Land Revenue* v. *Alagappa Chettiar*.[2]

In the third place, a certain passage in the Federal Court judgment would appear to lay down new law, in so far as miners are concerned, affecting the operation of the rule in *Rylands* v. *Fletcher*, in these terms: —

"Miners have to have water for their circulating system; otherwise it would be extremely difficult or uneconomical for them to extract the ores from the earth. The evidence of the senior inspector of mines would fairly suggest that this is normal mining practice. Were it otherwise, mining operations would always be exposed to claims for damages by owners of neighbouring lands. The principle in *Smith* v. *Kenrick*, (1849) 7 C.B. 515; 137 E.R. 205. I think, was designed to prevent such claims."

This was further reason why in our opinion leave should be given to appeal to the Yang di-Pertuan Agong so that all those engaged in a major industry in Malaya should know precisely where they stand.

In the fourth place we noted that, in his concluding submission at the trial, counsel for the appellants conceded without any reservation whatsoever that they were liable for nuisance — although it was, in his view, a case for nominal damages only. Before the Federal Court, counsel on page 20 of his written sub-

mission, again acknowledged that —

"a claim to establish rights and for nominal damages could not have been resisted and there would have been judgment by consent with negligible costs."

Since legal liability was thus clearly conceded. and since the Federal Court, nevertheless, held the appellants *not liable* on any ground whatsoever, we thought the respondents were entitled to a further appeal in order that justice may not only be done but be seen to be done.

Application allowed.

Solicitors: *Shearn, Delamore & Co.; Skrine & Co.*

MOHAMED ASHRAFF & ANOR. v. THE COMMISSIONER FOR FEDERAL CAPITAL, KUALA LUMPUR & ANOR.

[F.C. (Azmi L.P., Suffian and Ong Hock Sim F.JJ.) June 5, 1972]

[Kuala Lumpur —Federal Court Civil Appeal No. 40 of 1972]

Administrative Law — Certiorari — Audi alteram partem — Whether principle applies in respect of application to commissioner under Rent Control Act, 1966, s. 18A.

Practice and Procedure — Amendment at appellate stage — Substitution of title of party — Powers of the Federal Court — Courts of Judicature Act, 1964, s. 69.

Landlord and Tenant — Recovery of possession — Rent controlled premises — Area designated for development within Municipality of Federal Capital of Kuala Lumpur — Rent Tribunal no jurisdiction to entertain applications within such area — Power vested in Commissioner — Control of Rent Act, 1966 (as amended by Act A 87) ss. 12, 13, 18, 18A and 26.

This was an appeal against the decision of the learned Chief Justice, refusing an application for leave to apply for an order of *certiorari* to remove into the High Court an order of the Commissioner of the Federal Capital to be quashed. The said order was made on December 8, 1971, pursuant to section 18A of the Control of Rent Act, 1966, requiring Mohamed Ashraff, as tenant of premises No. 77 Jalan Tuanku Abdul Rahman, to deliver up vacant possession thereof on or before June 7, 1972, and awarding him compensation in the sum of $23,164.80.

The said premises was rented out to one Haji Mohamed Jee until his death intestate on April 18, 1970. The appellants, his sons, were granted letters of administration on October 19, 1971 but had not extracted the grant.

The only issue for determination was whether or not the principle of *audi alteram partem* or natural justice applied in respect of an application to the commissioner under section 18A of the Rent Control Act.

Held, dismissing the appeal: (1) section 18A of the Control of Rent Act, 1966 leaves no discretion with the commissioner upon proof of compliance with section 18A(1) (a), (b) and (c). In the absence of any provision as to the mode of inquiry, no question of failure to observe the principles of natural justice can arise. The commissioner's functions under section 18A appear to be purely administrative and any act pursuant thereto is not amenable to *certiorari;*

(2) pursuant to section 69 of the Courts of Judicature Act, 1964, the order of the commissioner would be amended by substituting for the word "tenant" wherever appearing. the words "the administrators of the estate of Haji Mohamed Jee".

Cases referred to:-

(1) *Lum See On* v. *Chan Kit Yong* [1956] M.L.J. 40 at p. 41.

(2) *Sweeney* v. *Sweeney* (1876) I.R. 10 C.L. 375.

(3) *Kechik & Ors.* v. *Habeeb Mohamed & Anor.* [1963] M.L.J. 127 at p. 129.

(4) *R.* v. *Ramsgate (Inhabitants)* (1827) 6 B. & C. 712; 108 E.R. 613.

(5) *R.* v. *Banbury (Inhabitants)* (1834) 1 A. & E. 136 at p. 142; 110 E.R. 1159.

FEDERAL COURT.

K. L. Rekhraj for the appellants.

Chan Siew Yoon for the first respondent.

V. P. Nathan for the second respondent.

In the court below, in an application for an order of *certiorari,* the following judgment was delivered by Ong C.J. on April 20, 1972:

Ong C.J. (Malaya): This is an application by the administrators of the estate of Haji Mohamed Jee deceased for leave to apply for an order of *certiorari* to remove into the High Court an order of the Federal Capital Commissioner to be quashed. The order complained of was one made on December 8, 1971 under the provisions of section 18A of the Control of Rent Act 1966 requiring Mohamed Ashraff, as tenant of premises No. 77, Jalan Tuanku Abdul Rahman, to deliver up vacant possession thereof on or before June 7, 1972 and awarding him compensation in the sum of $23,164.80.

This application was filed on Saturday April 15 and brought to my attention on April 18, upon a certificate of urgency submitted by Mr. Rekhraj. counsel for the administrators. He and his clients had been aware of the commissioner's order the day it was made, but despite the fact that they took no steps in the matter for over 4 months, I agreed to hear this application on April 20 on grounds of urgency, so that the applicants may have time to appeal against any decision I may have to make.

The relevant provisions of section 18A read as follows: —

"(1) The landlord of any controlled premises within the areas of the Municipality of the Federal Capital of Kuala Lumpur who desires to effect or cause to be effected thereto any development may apply for the recovery of the possession thereof to the Commissioner, and every such application shall be accompanied by —

(a) a planning permission which has been granted by the Federal Capital Planning Authority constituted under the law relating to planning for the Federal Capital of Kuala Lumpur;

(b) evidence that funds are or will be available for the purpose of putting into effect such development;

(c) a written undertaking by the landlord that work for the purpose of putting into effect such development will commence within six months of the date when possession of the premises shall have been obtained or within such further period as the Commissioner may determine in any particular case.

(2) The Commissioner shall, as soon as possible but not later than ninety days of receipt of an application made under this section, and after making such enquiries as he thinks fit, consider such application and make an order or refuse to make an order; and when an order is made the